

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Appellee,	)	MUNICIPAL COURT OF
	)	COOK COUNTY,
vs.	)	COUNTY DEPARTMENT -
	)	CRIMINAL DIVISION.
ROBERT J. EMMERICH,)	
)	
Appellant.)	_____
	)	HON. JOHN J. CROWLEY,
	)	MAGISTRATE PRESIDING

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, Robert J. Emmerich, was charged with driving a motor vehicle while under the influence of intoxicating liquor in violation of Section 47 of the Uniform Act Regulating Traffic (Ill. Rev. Stat. 1965, chap. 95 1/2, §144). He pleaded not guilty, waived a jury trial, and upon being found guilty as charged, he was fined \$105.00 and his driver's license was revoked.

The sole contention, on appeal, is that the State failed to prove the defendant guilty beyond a reasonable doubt.

The record reveals that on February 10, 1967, at about 12:30 A. M., Eli Blumenthal, a sergeant on the Chicago police force, observed the defendant drive his automobile into a parked car. After witnessing the collision from a distance of 15 feet, Sergeant Blumenthal came alongside the defendant and told him to pull in front of the car which he had just struck. Instead, the defendant backed his car away from the other car and drove off at an excessive rate of speed. The police officer pursued the defendant and saw him drive into a snow bank. After ordering the defendant to get out of his car the sergeant testified he smelled alcohol on the defendant's breath. Officer Blumenthal said he then asked the defendant why he left the scene of the accident and the defendant replied that he did not want to get in trouble. "He had been drinking and celebrating his coming home" The sergeant then turned the defendant over to

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Officer Chester Hulbert to conduct a further investigation and to book the defendant.

Officer Hulbert's written report showed that the defendant stated he had consumed four bottles of beer at O'Donald's Tavern between 10:30 P. M. and 12:00 P. M. He testified that the odor of alcohol on the defendant's breath was moderate and that the defendant's eyes were bloodshot. The officer said that the results of the various tests given to the defendant showed that the defendant was unsure on the balance test, sure on the walking test, sure on the turning test, sure on the finger to nose test with both the left and right hands, and sure on the picking up coin test. Also, the defendant's speech was fair. In Officer Hulbert's opinion, the defendant had been under the influence of alcohol and unfit to drive. A motion for a finding of not guilty made by the defendant at the close of the State's evidence was denied.

The defendant, Robert J. Emmerich., testified that he had consumed four bottles of beer from approximately 10:30 P. M. to 12:00 P. M. on the evening in question and might have had one beer before that at home. He admitted striking the parked car, but said he only did so in an attempt to avoid a collision with an oncoming car and because the car he hit was protruding into the street as a result of the snow storm. He testified further that he kept going down the street for about half a block because there was no place for him to park and that he turned into a side street so that he could turn around and go back to the police officer. On cross-examination the defendant said he did not remember that the police officer had pulled alongside his car.

Sergeant Blumenthal was recalled as a witness and testified that the vehicle struck by the defendant was parked parallel to the curb, that the automobile was not sticking out into the moving lane of traffic, and that there was about fifty feet of parking space in front of the struck car. He said he told the defendant to pull in front of the car, but the defendant took off at a high rate of speed and was apprehended only after a chase.

The defendant argues that no weight can be given the conclusion on the Alcoholic Influence Report Form since Officer Hulbert testified that on the Accident Report Form he said that the defendant was "not impaired" by the alcohol and on the Alcoholic Influence Report Form he always states a suspect's ability is impaired. Further, the defendant contends that the tests given to him by the police indicate only that he was unsure of his balance and that on the remaining tests he scored the best possible grade on five of six tests and of ten possible choices, the second best possible grade on the sixth test. The defendant also urges that the defendant's version of the collision - that the accident was caused by an oncoming vehicle which forced him into the parked car - was not contradicted by subsequent testimony by Sergeant Blumenthal. It is the defendant's contention that although credibility of witnesses is usually a judgment of the trial court and not disturbed by the Appellate Court, where evidence is contrary to all human experience and lacks credibility, the Appellate Court has substituted its judgment for that of the trial judge. The defendant cites People v. Butler, 28 Ill. 2d 88, 190 N.E.2d 800, and People v. Pellegrino, 30 Ill. 2d 331, 196 N.E.2d 670, as authority for this proposition.

In the Butler case the charge was larceny. The Supreme Court found the evidence as a whole to be conflicting and inconclusive. The two witnesses for the State "were not fluent and their answers were not always responsive or even intelligible. Their perceptions and memories were beclouded by alcohol." Also, there was no direct evidence of the larceny and the direct evidence was confused and conflicting on several vital questions of fact. In reversing, the Court held that "[d]ue deference to the trial judge's appraisal of the witnesses' credibility does not excuse this court from its duty to examine the evidence to determine whether guilt has been established beyond a reasonable doubt. (People v. Dawson, 22 Ill. 2d 260, 264)." In Pellegrino the defendant was convicted of murder. Only two of the State's witnesses testified at the trial that they had seen the defendant hit and kick the deceased. One of these two witnesses who was stunned, bleeding and crying, at the time of the beating, accused two other people before finally accusing the defendant. The Court said that "[t]here is nothing to indicate why she changed her story or on which occasion she was telling the truth." 30 Ill. 2d 331, 334, 196 N.E.2d 670. The other witness who said she saw the beating was in the fourth week of a seven week drunk. The Court stated that although she did not have a drink on the evening of the occurrence "her prior drunkenness had affected her to the extent that she could not walk five feet without holding the wall and did not recognize the person, who was three feet away from her...." 30 Ill. 2d 331, 334, 196 N.E.2d 670. The Court in reversing the conviction held that "[t]he trial judge's finding on credibility of the witnesses is entitled to great weight, but it is not conclusive and we will reverse a conviction where the evidence

is so unsatisfactory as to raise a reasonable doubt of defendant's guilt."

The two cases the defendant relies on are distinguishable on the facts. In Butler both witnesses were intoxicated at the time of the alleged larceny and their testimony was contradictory on several critical questions of fact. In Pellegrino one witness, did not recognize a person three feet away from her shortly before the deceased was beaten and the only other witness who testified she had seen the beating, accused two other people before accusing the defendant of murdering the deceased. In the instant case, however, testimony damaging to the defendant came from two police officers on the Chicago police force with twenty-seven years of experience between them.

There is evidence in the case at bar which, if believed, shows that the defendant struck a car parked parallel to the curb and clear of the lane of moving traffic and then fled arrest when ordered to pull over. In affirming a conviction for operating a motor vehicle while under the influence of intoxicating liquor, the Appellate Court in the somewhat similar case of People v. Solomonson, 54 Ill. App. 2d 211, 203 N.E.2d 729 (abstr.) stated that "[w]hen a person is accused of driving an automobile while under the influence of intoxicating liquor, the manner in which he drives his car is relevant to the issue of his being under the influence of intoxicants. People v. Evans, 290 Ill. App. 75, 78." There too, the defendant urged that the visual examination administered by the police officer was inconclusive.

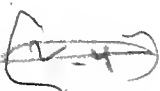
It was stipulated in the case at bar that a breathalyzer test taken two hours after the arrest read 0.14. The statute then in force provided that "if there was 0.15 percent or more



by weight of alcohol in the person's blood, it shall be presumed that such person was under the influence of intoxicating liquor." (Ill. Rev. Stat. 1965, chap. 95 1/2, §144).

Breathalyzer tests are admissible and competent evidence. While this evidence did not give rise to a presumption that the defendant was or was not under the influence of intoxicating liquor, the result of the test may be considered along with other competent evidence.

Both police officers testified that there was an odor of alcohol on the defendant's breath. Officer Hulbert testified that the defendant's eyes were bloodshot and his balance was unsure. In his opinion, the defendant was under the influence of alcohol and unfit to drive. The defendant admittedly was in a tavern for about one and one-half hours where he consumed four beers. The defendant further testified, on cross-examination, that he did not remember a police officer pulling alongside of him when he struck the parked car or that he was ordered to park his car.

 The matter of the credibility of witnesses and the weight to be given to their testimony is generally an issue for the determination of the trial court who has had the opportunity of seeing and observing the manner and demeanor of the witnesses. People v. Henson, 29 Ill. 2d 210, 193 N.E.2d 777. Where there is sufficient evidence to support the decision of the trial judge, as is the situation here, a reviewing court will not disturb the conviction.

The judgment and conviction is therefore affirmed.

AFFIRMED.

ADESKO AND MURPHY, JJ., CONCUR.

(Abstract only)

No. 52629

100 I.A. 3 67

~~100 I.A. 2~~

CITY OF CHICAGO, a Municipal)
Corporation,)

Appellee,)

vs.)

LOWELL J. MYERS,)

Appellant.)

APPEAL FROM THE CIRCUIT

COURT OF COOK COUNTY,

MUNICIPAL DEPARTMENT,

FIRST DISTRICT.

John A. Ouska, J.

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT.

Defendant, Lowell J. Myers, was charged with making an illegal left turn, in violation of Chapter 27, Section 218 of the Municipal Code of Chicago. After a bench trial, defendant was found guilty of the offense and fined \$10.00. He appeals, contending that the complaint charging him with the offense was defective on its face, and that the traffic signs prohibiting left turns at the intersection in question were not official, as required by the Municipal Code.

The arresting officer testified that on June 10, 1967, defendant was driving his automobile southbound on Western Avenue and made a left turn, eastbound on Devon Avenue in Chicago, and that signs were posted at the intersection which prohibited such a left turn. He also testified that left turns were prohibited at this corner between 10:00 a.m. and 6:00 p.m., and that defendant made this turn at about 10:10 a.m. Defendant did not cross-examine the officer.

Defendant, a lawyer and appearing pro se, testified that he made the left turn at the time and place charged, but that he did not see any signs prohibiting the turn. He also testified that after receiving the "ticket" from the officer, he returned to the intersection and viewed three signs "saying no left turn". He

stated that the signs were about twelve inches wide and twenty-eight inches high, and were written in red on a black background. He testified that one of these signs was on the far left-hand corner of the intersection and the other two signs were in the middle of the intersection.

While defendant argues that the written complaint was defective, we deem it necessary to consider only his contention that the traffic signs in question did not meet the required standards.

Ch. 95 1-2, Sec. 127 of the Illinois Revised Statutes provides in part as follows:

"Local authorities . . . in their respective maintenance jurisdiction shall place and maintain such traffic-control devices under their maintenance jurisdiction as may be required to indicate and carry out the provisions of this Act, and local traffic ordinances . . . All such traffic-control devices hereafter erected shall conform to the State Manual . . ."

Chapter 27, Section 218 of the Municipal Code of Chicago provides as follows:

"27-218 (No-turn signs.) Whenever authorized signs are erected indicating that no right or left turn or turn in the opposite direction is permitted, no driver of a vehicle shall disobey the directions of any such sign."

Chapter 27, Section 207 of the Code provides as follows:

"No provision of any ordinance for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper place and sufficiently legible to be seen by an ordinary observant person."

The Code further defines and describes official signs in Chapter 27, Section 347 as follows:

"All traffic-control signs, signals, and devices which conform to the Manual and specifications approved by the State Department of Public Works and Buildings. All signs and signals required hereunder for a particular purpose shall so far as practicable be uniform as to type and location throughout the city. All traffic control devices so erected and not inconsistent with the provisions of state law or this chapter shall be official traffic-control devices."

The Manual referred to in the above sections is the Manual of Uniform Traffic Control Devices for Streets and Highways issued by the Department of Public Works and Buildings of Illinois. Parts of the Manual were introduced into evidence at the trial by the defendant.

Among many requirements, the Manual provides that standard signs prohibiting left turns must be written in black on a white background, that they shall be rectangular in shape and that they shall be at least twenty-four by thirty inches. However, the Manual permits the use of alternative signs when the left turn restrictions apply only during certain periods of the day. In such cases, internally illuminated signs that are lighted and made legible only during the restricted hours, may be used. The Manual is silent as to the requirements in size and color of such internally illuminated signs, but at page 13 provides that in situations not specifically covered, "the judgment and experience of the traffic engineer must be depended upon for the choice and application of the guiding standards here set forth".

Defendant does not argue that the traffic-control signs in question were unauthorized, and it will be assumed that the signs were sanctioned by the proper authorities.

We reject the contention of the defendant that all traffic-control directional signs, including those which are internally illuminated and in use only during certain periods of the day, must meet the size, color and placement specifications of standard turn prohibition signs. However, under the facts and circumstances of this case, we must reverse the judgment of the trial court.

At the trial, the only evidence offered as to the size, color and placement of the traffic signs at the intersection was the uncontradicted testimony of the defendant. The defendant testified

that the signs in question did not meet the standard specifications required by the Manual, thus putting the validity of the signs in issue. Although the police officer had testified that turns were prohibited only during certain periods of the day, the city failed to adduce any testimony that the signs were internally illuminated, or that special specifications applied at the intersection in question. Absent such rebuttal, it was error for the trial court to determine that the traffic signs were official under the meaning of the Code.

Accordingly, the judgment of the Circuit Court is reversed.

JUDGMENT REVERSED.

BURKE, P.J., and LYONS, J., concur.

1002, 2/4/71

No. 52390

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BLAW-KNOX COMPANY, a corporation,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the
	)	Circuit Court of
EICHLEAY CORPORATION,	)	Cook County,
	)	Illinois.
Defendant-Appellant.	)	Honorable
	)	Edward G. Schultz.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from the Circuit Court of Cook County. On April 17, 1967, the court denied the motion of the defendant, Eichleay Corporation, to vacate and set aside a Declaratory Judgment (ch. 110, sec. 57.1, Ill. Rev. Stat. 1967) entered on August 24, 1964.

It is the contention of the defendant that the court lacked jurisdiction of the subject matter and that the order of August 24, 1964, is therefore void and may be attacked at any time.

It appears that plaintiff, Blaw-Knox Company, and defendant, Eichleay Corporation, entered into a construction contract on or about February 14, 1961. The contract contained a provision which purportedly required Eichleay to indemnify

Blaw-Knox from any loss arising from an injury occurring in connection with the performance of the contract.

On or about May 4, 1961, one Raymond Dobson, an employee of Petroleum Piping Company, a sub-contractor of Eichleay, suffered personal injuries in connection with the construction and subsequently filed suit to recover for his injuries against Blaw-Knox and Eichleay.

Blaw-Knox apparently demanded that Eichleay indemnify it for any recovery by Raymond Dobson against it and for expenses, including attorney's fees. Eichleay apparently refused such indemnity. Thereupon, Blaw-Knox in November of 1962 filed a complaint for declaratory judgment requesting that the court declare that under the terms of the contract, Eichleay Corporation must indemnify Blaw-Knox for any recovery by Dobson, including costs and attorney's fees. The order of August 24, 1964, granted the relief sought in the Declaratory Judgment action. No appeal was taken by Eichleay from this order nor was any other action taken until April 17, 1967, when defendant filed its petition to vacate the order of August 24, 1964.

¶ The defendant argues that the court lacked jurisdiction to enter a Declaratory Judgment because the plaintiff had another adequate remedy, that is, a suit for indemnification, and that the existence of such a remedy is a bar to the declaratory action. In support of this position the defendant relies upon *Goodyear Tire & Rubber Co. v. Tierney*, 411 Ill. 421, 420 and *Klatt v. Commonwealth Edison Co.*, 55 Ill. App. 2d 120, 136. In *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, the plaintiff sought an injunction

to restrain the enforcement of a City Ordinance and also sought a Declaratory Judgment that the ordinance was invalid. Our Supreme Court, at p. 352 stated:

"Since a suit for an injunction was proper, there can be no objection to the addition to the complaint of a request that the ordinance be expressly declared invalid. The plaintiffs might indeed have asked for a declaratory judgment alone. (citation omitted) Defendants' contention that the availability of affirmative relief by way of mandamus bars an action for a declaratory judgment is refuted by the explicit language of Section 57 1/2 of the Civil Practice Act. (citation omitted) Goodyear Tire & Rubber Co. v. Tierney, 411 421 is not to the contrary. We there held only that plaintiff desiring to challenge the validity of a tax assessment must pursue the statutory remedies provided by the Revenue Act, and that a declaratory judgment, like an injunction, could not be had in the absence of circumstances supplying a basis for interference with the collection of taxes. The case in no way suggests that an action for declaratory relief is defeated by the mere existence of another form of action which could presently be employed."

In Kupsik v. City of Chicago, 25 Ill. 2d 595, the court, at p. 598, stated:

". . . In the early days of the declaratory judgment in this country, some courts held that a declaration of rights could not be had if any of the ordinary forms of relief were available . . . To avoid such a result, our statute, like the Uniform Declaratory Judgment Act, makes it clear that declaratory judgment is not precluded by the availability of other relief . . . The declaratory judgment has thus become an optional alternative remedy."

In State Farm Mutual Automobile Ins. Co. v. Morris, 29 Ill.

App. 2d 451, 459, it was held:

". . . The remedy of declaratory relief is not exclusive, but merely cumulative and alternative. The existence of other remedies does not necessarily preclude judgment for declaratory relief, even though such other remedies may be equally effective . . ."

 Eichleay also argues that the complaint for Declaratory

Judgment was premature. It attempts to cast the suit for Declaratory Judgment as to whether there is an indemnity agreement between the parties into a suit for indemnification. The personal injury action by Dobson has not yet been litigated. Whether a judgment will ever be rendered against Blaw-Knox is speculative at this point. However, that costs and expenses have been and will be incurred is not speculative and as to whether or not Eichleay must reimburse Blaw-Knox for its expenses, attorney's fees, costs and for any judgment rendered against it is something which may properly be determined in a Declaratory Judgment action before final judgment is rendered in the personal injury suit.

In *Chester C. Fosgate Co. v. Kirkland*, 19 F. Supp. 152, 159, in construing the Federal Declaratory Judgment Act, after which our Act is in many respects patterned, the court stated:

"In *Gully v. Interstate Natural Gas Company*, 82 F. (2d) 145, 149 the Fifth Circuit Court of Appeals cited and followed *Black v. Little* together with other authorities. Circuit Judge Hutcheson, delivering the opinion of the court, pointed out the remedial character of the Declaratory Judgment Act, and held that in an appropriate case a court may take jurisdiction under that statute and 'grant the relief of declaration, either before or after the stage of relief by coercion has been reached' . . ."

Defendant urges that no actual controversy exists and for that reason the court had no jurisdiction to enter an order for declaratory relief. The authorities cited set forth that there is a clear statutory requirement that before a declaration of rights maybe made there must be an actual controversy. The fundamental

principles underlying the determination of whether there is an actual controversy are well stated in *Exchange Nat. Bk. v. County of Cook*, 6 Ill. 2d 419, 421, 422, (1955); *Fairbanks, Morse & Co. v. Freeport*, 5 Ill. 2d 85, 89, (1955), and *Spalding v. City of Granite City*, 415 Ill. 274, 283 (1953).

However, in the instant case the defendant filed a Motion to Dismiss the Complaint in due time. The Motion was denied by the Trial Court on March 25, 1963. In said Motion the defendant urged that the Complaint did not state a cause of action for declaratory relief, the action was prematurely brought and that the agreement seeks an indemnity for negligence or acts of the plaintiff.


On April 24, 1963, the defendant answered the Complaint and filed a third party Complaint seeking similar relief from Petroleum Piping Company, a sub-contractor of the defendant.

On August 24, 1964, an Order finding against the defendant was entered and on the same date the defendant obtained an Order on the third party Complaint against Petroleum Piping Company.

It was not until April 17, 1967, that defendant sought by Petition and Motion to vacate and set aside the Declaratory Judgment entered August 24, 1964, for the readjudication of the Declaratory Judgment.

The Trial Court denied this Motion and we are of the opinion that the action of the Court in so doing was proper.

We do not pass upon the propriety of the entry of the Declaratory Judgment but conclude that the Court in entering the judgment complied with the statutory provisions and must have found that there was an actual controversy.



It was incumbent upon the defendant to perfect the appeal from the original order if relief was to be sought. For this reason we affirm the Trial Court.

"A trial court cannot review its own order or judgment and correct the same, either as to any question of fact found or decided by the court or as to any question of law decided by it after the expiration of thirty days."

Brockmeyer v. Duncan, 18 Ill. 2d 502, 505. (1960).

The judgment of the lower Court is affirmed.

JUDGMENT AFFIRMED.

MORAN, J. and SEIDENFELD, J. concur.

No. 67-90

100 I.A. ²142-6

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1968.

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of Kankakee
vs.	)	County, Illinois.
)	
)	
DAVID LEE ZAGIER,	)	Honorable
	)	Victor N. Cardosi,
	)	Judge Presiding.
Defendant-Appellant.)	

ALLOY, P. J.

Defendant David Lee Zagier appeals to this Court from an armed robbery conviction in the Circuit Court of Kankakee County.

The evidence in this cause disclosed that on December 9, 1966, defendant, David Lee Zagier, drove an automobile into a gasoline service station at which Gary L. Bean was an attendant. There was evidence that appellant pulled a pistol out of his belt and said, "Give me all your money-- lay all your money on the table." He thereafter demanded that Bean get more money which was procured from a back room. The lights inside and outside the station building at that time were stated by Bean, who testified, as being good and he identified defendant as the perpetrator of the robbery. The perpetrator of the robbery was stated to be in the station and in the presence of the witness for approximately 45 seconds.

Another witness, Albert Henry Bolich, testified that he had spent the evening of December 8, 1966, with defendant and that at about 9:00 P.M. on that day they left Chicago driving around in a rented car and finally came to Kankakee where they stopped at a bowling alley. He further testified that defendant asked him if he wanted to "hit" a certain gas station and the witness replied, "If you want--it is up to you." They then drove through alleys and found a Chevrolet with keys in it, which they then moved to an alley near the gas station, and then checked to determine how to get out of town. The witness testified that defendant got in the Chevrolet, while Bolich drove the rented car to a point down the block from the gas station. He stated that defendant then returned in the stolen Chevrolet which he put back in its garage, and they left the scene. Witness Bolich also testified that he had pleaded guilty to a misdemeanor and had received one year's probation and a fine of \$75 and that police had told him things would be made easy for him if he pleaded guilty to the lesser charge, and that was why he was testifying.

On appeal in this Court, defendant contends that the trial court committed reversible error in failing to properly instruct the jury. An instruction which was given was in the following form:

"An accomplice witness is one who testifies that he was involved in the commission of a crime with the defendant. The testimony of an accomplice witness is subject to suspicion, and should be acted upon with caution. It should be carefully examined in light of the other evidence in the case."

Another instruction which defendant tendered and which was refused was in the following form:

"The Court instructs the jury that if they believe from the evidence that the witness, Albert Bolich, was induced to become a witness and testify in this case by any promise

of immunity from punishment or by any hope held out to him by anyone that it would go easier with him in case he disclosed who his confederate was, or in case he implicated someone else in the crime, then the jury should take such facts into consideration in determining the weight which ought to be given to his testimony thus obtained and given under the influence of such promise or hope."

The trial court refused to give the latter instruction on the basis that the instruction first recited had been approved and was in fact given.

The courts of this State have concluded that where a jury must determine innocence or guilt largely upon the testimony of an accomplice, it should determine whether the purpose of the witness was to shield himself from punishment, obtain some personal benefit, or gratify his malice (PEOPLE v. LAWSON, 345 Ill. 428). The testimony of an accomplice is discredited and looked upon with suspicion and a jury should be instructed as to its unreliable character (PEOPLE v. GLEITSMANN, 361 Ill. 165).

In the cause before us, however, the record discloses that the testimony of Bolich, who indicated that he was an accomplice, was not the only direct testimony, since the victim of the robbery testified clearly and convincingly in identifying the defendant. Such testimony in itself would be sufficient to sustain a conviction (PEOPLE v. OSTRAND, 35 Ill. 2d 520, at 532). The instruction which was actually given in this cause told the jury specifically that the testimony of an accomplice witness was subject to suspicion and should be acted upon with caution and should be carefully examined in light of the other evidence in the case. While it would have been preferable to incorporate within such instruction the recitals contained in defendant's refused instruction (to the effect that if the jury believed that

the witness Albert Bolich was induced to become a witness and testify in the case by a promise that things would go easier with him) under all the facts in the record and in view of the direct testimony of the victim identifying the defendant, we do not believe that the refusal of such instruction constituted reversible error. We cannot say on the basis of the record that the testimony of Bolich as an accomplice was the only basis for a conviction.

Objection was also made to an instruction which was refused which simply advised the jury that it was not bound to take the testimony of any witness as absolutely true and should not do so if it believed the witness was mistaken or if the evidence was untrue or unreliable. In view of the fact that an accomplice instruction was given we do not believe that such omission would justify reversal. We also do not believe the questioning of witness Bolich by the trial court which developed that witness Bolich was attending college at the time and had not been in trouble previously would justify a reversal and we, therefore, find there is no reversible error in the record.

The judgment of the Circuit Court of Kankakee County will, therefore, be affirmed.

Judgment affirmed.

Stouder, J. and Scheineman, J. concur.

Abstract

VS.

Defendant-Appellant.

Honorable
Henry J. Ingram,
Judge Presiding.

SCHEINEMAN, J.

At approximately 4:00 a.m. on the morning of January 21, 1967, the defendant and Myron Peterson were driving around in a 1962 white Chevrolet convertible belonging to Peterson's wife. They had previously been in the company of other boys, drinking beer. Peterson then stopped by his apartment and went inside. The State says the purpose of the stop was to procure a weapon; the defendant says the purpose was to speak to his wife. The two then drove to the south side of Peoria. Some testimony indicated a common plan to rob a filling station at the corner of MacArthur and Adams streets

in Peoria while the defendant denies any agreement to do so. The defendant at this time knew that Peterson had a gun.

The two then went to another filling station, at the corner of Western and Howett Streets in Peoria. Peterson asked the attendant, Dennis Scott, for gasoline. When Scott came to the car window, Peterson pointed the gun and money was taken from Scott. The robbery occurred at approximately 5:00 a.m. The defendant denies any knowledge that Peterson intended to rob that station, although there is some evidence that the defendant had knowledge of the intended act and acceded to it. The defendant maintains that he was dozing in the passenger seat when they pulled into the station and observed Peterson's acts. The robbery was completed in a very short time.

After speeding away from the station, the two headed west out of Peoria on Route 116. After traveling several miles, they stopped the car to relieve themselves. Before that stop, defendant counted the money, giving it back to Peterson, and hid the gun under the dashboard on the passenger side. After the stop, defendant took over driving. The State Police then apprehended them and took them into custody.

The defendant and Peterson were placed in a line-up at 6:00a.m. at the Peoria police station. Counsel was not then present and defendant was not advised of his right to counsel. There is conflicting testimony by the witnesses at the line-up as to the identification made there by Scott. Scott testified that he could not see their faces well and that the passenger in the car did not talk, so far as he was aware. Scott could not positively identify defendant. A State Police officer, Ronald Rumler, testified that Scott selected defendant out of the line-up by his voice. Howard Margrath, Deputy Sheriff of Peoria County, testified that

Scott picked Myron Peterson and defendant out of the line-up, saying that he was "pretty positive" that defendant was the other fellow in the car.

At approximately 7:00 a.m., the two were taken to County jail where the defendant, after being advised of his rights, gave an oral statement to two Deputy Sheriffs and later a written statement was taken from defendant by an Assistant State's Attorney.

After Peterson's plea of guilty, he was sent to the state penitentiary during the week of April 24 to April 30, 1967. The trial of defendant began on May 1, 1967.

The defendant argues ten grounds for appellate relief consisting of reversal, remanding for a new trial, or reduction of sentence: 1-3, that defendant was denied right to counsel in violation of defendants constitutional rights at the line-up, thus violating the Sixth and Fourteenth Amendments of the U. S. Constitution; (4) That the conduct of the assistant state's attorney violated his duty as an officer of the court and in so doing denied defendant's right to a fair trial; (5) that the failure of the State to call Myron Peterson as a witness shifted the burden of proof to defendant; (6) the state failed to try the issue of "mere presence," again shifting the burden of proof to defendant, and also failed to prove defendant guilty beyond a reasonable doubt; (7) a newspaper article denied defendant a fair trial; (8) the trial court erred in instructing the jury; (9) the trial court erred by refusing defense counsel time to obtain an official report of a Supreme Court decision; (10) the trial court abused its discretion in imposing sentence on defendant.

The first three points, based on the subjection of defendant to a line-up without warning him of his right to counsel, are premised principally on United States v. Wade, 388 U. S. 218, 87 S.Ct. 1926. Wade held that it is a violation of Constitutional rights to introduce any testimony concerning a line-up absent advice to the defendant of his right to counsel. Wade was decided by the United States Supreme Court after the line-up in issue here, and does not confer rights or affect the body of constitutional law retroactively. Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967 held that Wade does not apply to line-up confrontations occurring prior to June 12, 1967. This principal is recognized in Illinois. People v. Nieman, 90 Ill. App. 2d 337, 347. Therefore, defendant's arguments in this area are not determinative of this case.

Defendant argues further that the conflicting testimony concerning the identification at the line-up served to shift the burden of proof to the defendant, saying that the errors there in identification were prejudicial when brought to light at trial. While error in a trial could conceivably have the effect of altering the actual locus of the burden of proof, such error would be in court rulings, see People v. Weinstein, 35 Ill. 2d 467, and not a failure of recollection on the part of a witness or witnesses. Any confusion on the part of witnesses to the line-up identification would properly affect the credibility of such identification, but it is difficult to see how defendant can complain because the credibility of an identification is subject to attack. People v. Crenshaw, 15 Ill. 2d 458.

The defendant makes argument that the conduct of the assistant State's Attorney who tried the case was violative of his duty as an officer of the court and denied defendant a fair trial. This

serious charge is made by the defendant on the grounds that the State knew that Peterson was the driver of the auto at the robbery, but did not call him for trial and the State introduced conflicting testimony concerning the line-up identification and referred to the line-up testimony in final argument, and that the State, in final argument, said "Dennis Scott's mother was just that close to her son's death, the heartbreak, just the pull of a trigger. But I won't mention that . . ."

Defendant's contentions are bottomed on a dictum in United States v. Wade, 388 U. S. 218, 87 S.Ct. 1926, 1947, that a prosecutor is a servant of the law and should refrain from improper methods calculated to produce a wrongful conviction. That same dictum points out that the prosecutor "may prosecute with earnestness and vigor -- indeed, he should do so." While a trial is a search for truth, it is still a trial -- an adversary proceeding -- at which the State has a definite burden of proof. The State is entitled to act as an adversary. The argument by the State here in commenting upon the evidence presented does not go beyond the grounds of vigorous prosecution. The reference to the mother of Dennis Scott was made only after counsel for the defense had argued concerning the defendant's family. No objection was made by the defense to the remark. The quoted remark was the only reference to the family of the victim of the robbery, and while the State should properly confine itself to the circumstances of the crime with which the defendant is charged, People v. Gregory, 22 Ill. 2d 601, 605, in view of the whole record, it cannot be said that the remark was prejudicial. Further, the People do have the right to reply or answer to areas opened by final argument of the defense. People v. Finney, 88 Ill. App. 2d 204, 211.

Defendant also urges as a grounds for relief the fact that the People did not call Myron Peterson. He has cited no cases to the proposition that the People must call all possible witnesses to a crime and that is not the law in this State. If the defense had felt that Peterson's testimony would have been beneficial, it could have called him, or asked that he be called as a Court's witness, upon a proper showing of adversity and requirements for justice. None of these things were done. The witness was in prison at the time, but the record reveals no motion for continuance in order to bring him back nor a motion for writ of habeas corpus ad testificandum. Therefore, this argument by the defense is without merit.

Defendant next argues that the People refused to try the issue of "mere presence" and hence shifted the burden of proof to the defendant, and further failed to prove the defendant guilty beyond a reasonable doubt. As grounds, defendant again points to the conflicting line-up testimony, arguing again that permitting the introduction of conflicting testimony was error, and again pointing out that the People knew defendant was a passenger, and not the driver. As has been discussed above, the mere fact that line-up identification was conflicting affects only its credibility, and not its admissibility.

There was sufficient evidence upon which the jury could find the defendant guilty beyond a reasonable doubt. "While mere presence or negative acquiescence is not sufficient to constitute a person a principal to a crime, one may aid and abet without actively participating in the overt act, and if the proof shows he was present at the crime without disapproving or opposing it, the trier of fact may competently consider this conduct in connection

with other circumstances and thereby reach a conclusion that such person assented to the commission of the criminal act, lent his countenance and approval and was thereby siding and abetting the crime." People v. Clark, 30 Ill. 2d 67, 195 N.E.2d 157, 160; People v. Washington, 26 Ill. 2d 207, 209. Subsequent acts are competent to be considered as proof of guilt, People v. Bracken, 68 Ill. App. 2d 466, 469, and flight can be introduced as showing guilt, People v. Mendoza, 24 Ill. 2d 265. The defendant also hid the weapon and counted the money. He did nothing at the gas station to attempt to stop the robbery nor did he attempt to get out of the car. The defense of "mere presence" was based solely on defendant's own testimony, and thus the credibility of the witness was of vital importance. Credibility of witnesses is a matter for jury consideration and assessment. On the record as a whole, it cannot be said that the verdict is so palpably contrary to the evidence, or so unreasonable or improbable that the verdict cannot stand on the issue of reasonable doubt as to defendant's guilt. People v. Sustak, 15 Ill. 2d 115, 117.

Defendant next argues prejudice because a newspaper article "emphasized" certain testimony in the case. The article referred to testimony by one of the officers present at the line-up that Scott had identified the defendant by voice. The article reported only what had happened and contained no editorial comment on the importance of the testimony. Reporting of testimony at a trial alone does not make it appear that the jurors or some of them have been influenced or prejudiced by it, nor was the article of a nature which would reasonably seem to have this affect. People v. Malmenato, 14 Ill. 2d 52. Therefore, no prejudicial error was

committed by the trial court in failing to instruct the jury to disregard that article or any other.

The defendant also argues that the jury was improperly instructed. This argument is based on the fact that the People tendered eighteen instructions; that an instruction on circumstantial evidence was given; that the instruction on accountability, Ill. Rev. Stat. ch. 38, Sec. 5-2 left out the proviso; that an instruction should have been given in terms of Ill. Rev. Stat. ch. 38, Sec. 4-1; that a paraphrased instruction on Ill. Rev. Stat. ch. 38 Sec. 5-3 should have been given; that the court should have given a tendered instruction on Ill. Rev. Stat. ch. 38, Sec. 7-13; and that the court should have given defendant's tendered instruction informing the jury of the penalty. Insofar as the number of instructions is concerned, there is no showing that the jury was overinstructed, that certain matters were unduly emphasized, or that instructions were confusing or misleading. While instructions should be as short as possible, adequacy should not be measured in terms of page count. Circumstantial evidence was involved in the case, there being only some direct testimony that the defendant actively acquiesced in the crime. The proviso in Sec. 5-2 had no applicability to this case, and would only have confused the jury. Defendant's instruction on Sec. 4-1 was not a necessary instruction. Defendant's instruction which paraphrased Sec. 5-3 was not an accurate paraphrase of that section. There was no evidence of necessity or duress introduced to support an instruction based on Sec. 7-13. While that instruction could possibly have been given without prejudice, no prejudicial error occurred by the court refusing it. Finally, the jury is to determine whether an offense was committed beyond a reasonable doubt, and the penalty attached for commission of such offense is not relevant to

the jury's inquiry. Therefore, the court properly refused defendant's instruction instructing the jury on the penalty. It should also be pointed out that defendant did not properly present the issue of instructions for review. An abstract was prepared, but instructions, given, refused, and tendered, were not abstracted for consideration. People v. Donald, 29 Ill. 2d 383.

The argument made by the defendant that the trial court erred in refusing a continuance for defense counsel to obtain a transcript of United States v. Wade, supra, which was announced shortly before post trial motions is moot. The case, as indicated above, does not affect the decision here.

The final point argued by defendant is that the trial judge abused his discretion in sentencing the defendant because the other participant in the offense, Peterson, received a lesser sentence. Equality of sentence is not required by the law of this state, People v. Tice, 89 Ill. App. 2d 313, 318, and the trial judge is given wide latitude in sentencing. The factors underlying the sentencing of Peterson are not before this court and on the record presented, it cannot be said that the sentence rendered is palpably an abuse of the trial court's discretion.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

$100 \text{ I.A.}^2 = 100$

CHICAGO BAR
ASSOCIATION
ANTHONY F

APPEAL FROM THE CIRCUIT

COURT OF COOK COUNTY.

FIRST MUNICIPAL DIVISION.

Lawrence Genesen, J.

Defendant, Anthony Rutzen, was charged with driving a motor vehicle while under the influence of intoxicating liquor, negligent driving and failure to remain at the scene of an accident. After a bench trial, defendant was found guilty of driving while under the influence of intoxicating liquor (Section 47 of the Uniform Act Regulating Traffic on Highways. Ill. Rev. Stat. 1967, Ch. 95 1-2, par. 144). He was fined \$100 and costs on that charge, and was found not guilty of the other offenses. Defendant appeals, contending that the State failed to prove the corpus delicti and failed to establish the defendant's guilt beyond a reasonable doubt.

On the trial of the case, the only witness to testify was the arresting officer. On direct examination, Officer Donald Benson testified that he was in the vicinity of 2812 Wolcott (Chicago) at approximately 12:30 A.M., March 31, 1967. Upon his arrival, he saw the complainant standing alongside of his automobile which was parked at the curb and damaged at the left rear side. Defendant was not in the area when the officer first came, but arrived some time later. The officer

then had a conversation with the defendant, and, over defendant's objection, was permitted to testify as to that conversation. He testified that defendant told him "he was driving the car with license number supplied by the complainant, and that he owned the car and was interested in getting it towed to his brother's house." Defendant also denied being involved in any accident. Two other police officers drove defendant and Officer Benson to defendant's automobile which was parked several blocks away. Defendant's vehicle was damaged at the right front side. Officer Benson noticed that defendant had been drinking, and took defendant to the police station where he administered an alcoholic influence test. As a result of the test, it was the officer's opinion that defendant was under the influence of alcohol. Counsel for defendant did not cross-examine and no other witness testified. At the conclusion of the State's case, the court denied defendant's motion for a directed verdict. Defendant then rested without presenting testimony. The court entered a finding of guilty, and this appeal follows.

In order to justify a finding of guilty, the State must prove the corpus delecti and the guilt of the defendant beyond a reasonable doubt. People v. Miller, 23 Ill. App.2d 352, 163 N.E.2d 206 (1959). In that case, the court held that the State had the burden of showing:

"both that the defendant drove the car at the time and place in question and that he was then and there under the influence of intoxicating liquor".

In the instant case, the defendant does not question the validity of the officer's conclusion that defendant was under

the influence of intoxicating liquor when tested at the police station. The only issue presented is whether the State established beyond a reasonable doubt that defendant was driving while so intoxicated. We find that the State failed to do so.

While it is well settled that the corpus delecti may be established by circumstantial evidence, and while it is not essential that defendant be observed in the act of driving while intoxicated to sustain the State's burden of proof, People v. Garnier, 20 Ill. App.2d 492, 156 N.E.2d 613 (1959), it is necessary that the elements of the offense be established by evidence, not by conjecture or speculation. In the instant case, the testimony of the police officer was sufficient to infer that vehicles belonging to the complainant and the defendant had been involved in an accident. However, the record is completely silent as to when this accident occurred or as to who was driving at the time of the accident. Further, while the defendant told the officer that he had driven his automobile, there was no showing as to when that conversation took place, nor as to when defendant came on the scene, nor did the admission itself indicate when the defendant last operated his vehicle. In addition, the defendant denied being involved in any accident. From the evidence presented by the State, with its total silence as to the time element of both the offense and the statements, it would be as reasonable to conclude that defendant became intoxicated after driving the vehicle as to find that he was driving while under the influence of alcohol. People v. Miller, supra.

In support of its position that the corpus delicti was established, the State cites People v. Haehnel, 78 Ill. App.2d 71, 223 N.E.2d 464 (1966). In that case, although no one witnessed the accident, both the complainant and the police officer testified as to the damage to the automobiles and as to the admissions made by defendant that he was driving the automobile which struck the complainant's vehicle. No such testimony was adduced in the case at bar.

The State also cites People v. Garnier, supra. There, the defendant was arrested for a parking violation while sitting behind the wheel of a parked car. Defendant did not contest the drinking issue, but contended the conviction could not stand because no one had observed him operating the vehicle. The majority found that the evidence was sufficient to support the conviction, stating that circumstantial evidence which produced a reasonable and moral certainty that the defendant committed the crime was sufficient to sustain the finding of guilty. Clearly, in the case at bar, under the evidence presented by the State, there was no reasonable and moral certainty that the defendant was operating his vehicle while under the influence of alcohol.

Accordingly, the judgment of the Circuit Court is reversed.

JUDGMENT REVERSED.

BURKE, P.J., and LYONS, J., concur.

100 I.A. 2360

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ACME SECRET SERVICE LTD.,)	
an Illinois corporation,)	
	)	Appeal from the Circuit
Plaintiff-Appellee,	)	Court of Cook County,
	)	Illinois, First Muni-
vs.	)	cipal District.
)	
IRENE ALEXANDER,	)	Honorable William
	)	Barth, Trial Judge.
Defendant-Appellant.)	

Goldenhersh, J.

Defendant, Irene Alexander, appeals from the judgment of the Municipal Court of Chicago, First Municipal District of the Circuit Court of Cook County entered in favor of plaintiff in the amount of \$2,400.00.

The judgment order, entered on November 22, 1965, recites ".... the defendant being absent and not represented and thereupon this cause comes on in regular course for trial before the Court without a jury and the Court having heard the evidence and the arguments of counsel...."

On November 24, 1965, defendant filed a petition to vacate the judgment order. The petition, in substance, states that the case was set for trial on November 16, 1965, defendant appeared at her attorney's office at 9:15 A.M., at 10:00 A.M. her attorney advised her the case would be tried at 2:00 P.M., counsel appeared at that time, the court was busy with another matter and counsel advised her to return to his office at 9:15 A.M. on November 22, 1965. She states she has a good and meritorious defense which is set out in her answer, and part

of her defense to plaintiff's claim is that plaintiff's principal officer admitted in a deposition that he had bribed certain public officials.

The petition is supported by three affidavits. In defendant's affidavit she states that on November 11, 1965 she experienced severe rectal pains and bled profusely, she immediately "contacted" her physician and again consulted with him on November 19, 1965; she saw a surgeon on November 18, 1965, who expressed the opinion that correction of the condition would require surgery, her first physician advised her to "stay in bed" for two weeks and the condition might improve and surgery not be required, she had suffered excruciating pain continuously from November 11, 1965, and on November 22, 1965 was not ambulatory and therefore was not able to appear in court.

In his affidavit, defendant's physician states he was consulted by defendant "approximately two weeks ago" relative to a "fissure in ano" which was causing her severe pain and hemorrhaging, he treated her on November 19, 1965 and advised her to go to bed, apply hot packs and remain in bed; as her physician he instructed her not to leave her bed on November 22, 1965.

An associate of defendant's attorney, in his affidavit, states that defendant called him at 9:15 A.M. on November 22, 1965 and advised him she would be unable to appear in court at 9:30 A.M. because "she was suffering from rectal hemorrhaging"; he answered the trial call at 9:30 A.M. and informed the court that defendant would be unable to appear because her physician had ordered her to bed, he moved orally that the cause be continued for two weeks; he informed the court that defendant's physician could be reached by telephone to

confirm the representations made to the court. Except for the statements contained in this affidavit, the record fails to show either the request for continuance or any ruling thereon.

The trial court denied the petition to vacate, and this appeal followed.

As grounds for reversal defendant contends that the trial court's arbitrary denial of her petition to vacate the judgment violated her right to due process of law guaranteed by the Constitutions of the United States and the State of Illinois, and assuming no constitutional question is involved, the court's action was arbitrary, capricious and reversible error.

~~7/1~~ In Chicago Land Clearance Co. v. Darrow, 12 Ill. 2d 365, the Supreme Court said, at page 369: "It is first argued that there has been a taking of property without due process of law. Defendants assert that the denial of due process resulted from the denial of their motions for a continuance and a series of erroneous rulings by the court. It appears to be elementary that there is no question of due process involved here. The essential elements of due process of law are notice and an opportunity to be heard in an orderly proceeding adapted to the nature of the case. If errors are committed they may be corrected in the manner provided by law for correction of such errors. (Benton v. Marr, 364 Ill. 628.) In short, due process of law is not a guarantee against error. In this case the trial judge had within his discretion the power to rule as he did on the motion for continuance (no statutory right to continuance being involved) and on other matters during the trial. Even though the rulings complained of may have been erroneous, they did not deprive the defendants of due process of law."

2 ~~1~~ In our opinion, it follows that if the denial of a request for continuance, albeit erroneous, is not a denial of due process, the refusal to vacate a judgment entered upon denial of a motion for continuance cannot be held to be a denial of due process.

In *Brown v. Air Pollution Control Board*, 37 Ill. 2d 450, the Supreme Court said, at page 454: "A court or administrative body possesses a broad discretion whether to allow or deny a motion for continuance, but it is a discretion which must be exercised judiciously, and not arbitrarily. A continuance should not be denied where clearly it is required by the ends of justice, and a refusal to grant it is an abuse of discretion warranting reversal. *Leathers v. Leathers*, 13 Ill. 2d 348, 352."

The issue presented on review is whether, in denying the request for continuance and the motion to vacate, the trial court abused its discretion. Unless the record shows such abuse, the judgment must be affirmed, *Gray v. Gray*, 6 Ill. App. 2d 571.

This action was brought by plaintiff to recover sums claimed to be due it for fees earned, and expenses incurred, in performing investigative work for defendant in connection with an action for divorce in which she was the plaintiff. The decree of divorce is in evidence, and provides that she is to pay or "otherwise satisfy" the sums due plaintiff, and indemnify and hold harmless her former husband from any liability based thereon.

The record shows that during the pendency of this case defendant changed counsel twice, failed to respond to a demand for a Bill of Particulars, and failed to comply with an order to produce certain documents. Although the "half-sheet" does not indicate at whose



request the orders were entered, it reflects 14 postponements.

No reason is shown for defendant's failure to notify her counsel of her illness prior to the morning of November 22, 1965. The petition fails to show what testimony defendant would offer in defense of the claim, and it appears from the petition that the "public policy" defense was based on admissions in plaintiff's principal officer's deposition.

~~Ex~~ An important factor to be considered in determining whether the trial court abused its discretion is the degree of diligence exercised by the party seeking the continuance. *Leathers v. Leathers*, 13 Ill. 2d 348, 353.

~~P~~ Although defendant moved with alacrity in filing her petition to vacate the judgment, the repeated postponements, two changes of counsel, and failure to comply with the prior orders of the court are not demonstrative of diligence at any prior stage of the proceedings. Furthermore, there appears to be no reason why counsel, upon denial of the request for continuance, did not participate in the trial and cross-examine plaintiff's witnesses. The defense asserted because of the alleged bribery might have been developed on cross-examination, and a motion for continuance made at the close of plaintiff's case to enable her to testify might have presented the issue of defendant's diligence in an entirely different posture.

We have considered *Krupinski v. Denison*, 9 Ill. App. 2d 155, and *Kehrer v. Kehrer*, 28 Ill. App. 2d 296, cited by defendant, and find them so clearly distinguishable on the facts as to require no further discussion.

From our review of the record we cannot say that the trial court abused its discretion, and the judgment is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

1001A²451

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 24th day
of OCTOBER A. D. 1968, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

100-100000

State of Illinois
In the Appellate Court
Fourth District

People of the State of Illinois,)	
Plaintiff-Appellee)	
vs.)	
Russell Sloan,	)	Appeal from
Defendant-Appellant	)	Circuit Court
		Coles County

Smith, P.J.

Defendant was found guilty of burglary by a jury and sentenced to 1-5 years in the penitentiary. In his motion for new trial, denied in the trial court, and on this appeal the defendant's only contention is that the evidence does not establish his guilt beyond a reasonable doubt. This is predicated upon his assertion that the evidence connecting him with the crime is purely circumstantial; that the fruits of the crime found under the porch rented by him was not in his exclusive possession, and that his alibi was reasonable and should be believed.

The defendant occupied a rear apartment in the building which housed the burglarized grocery store. It was operated by one Clinton Haddock and his wife. Mrs. Haddock testified that her husband was in the hospital; that around 4 o'clock in the morning as she went to the door of her own apartment she saw the door to the store open and close; that someone came out; that she did not see that individual actually in the store; that the person was the defendant; that she was about six feet away from him; that she met him at the door and asked him if he had been in the store and he didn't answer. She asked him again and he ran between the buildings and went east. Mrs. Haddock reported the matter to the police at 4:22 a.m. and they came immediately to her place. The plate glass window was broken and cigarettes and other articles were taken. They were found under the porch of the apartment occupied by the defendant. While the police were still there, the defendant returned from what he stated was a trip uptown to get more liquor for him and his girl friend. The girl friend testified that he did not leave the apartment until 4 to 4:15. He testified likewise. A taxi cab company which was about four blocks east of the grocery store confirmed the fact that he had been there around 4:10 to 4:15, asked if they knew where he could buy some liquor and was then returned by them to his apartment. When he returned, the police were already there. The defendant categorically denied that he knew anything about the cigarettes or how they reached the place under his porch or that he was at the front of the building when

Mrs. Haddock identified him or that he broke the plate glass window or entered her building or was in any manner guilty.

There is no direct evidence that directly connects this defendant with the crime, but a conviction can be sustained under circumstantial as well as upon direct evidence. *People v. Hansen*, 5 Ill.2d 535, 126 N.E.2d 243; *People v. Weiss*, 357 Ill. 580, 12 N.E.2d 652; *People v. Schullo*, 360 Ill. 580, 196 N.E. 723; *People v. Russell*, 17 Ill.2d 328, 161 N.E.2d 309. The credibility of the witnesses and the weight to be given to their testimony is a question for the jury and it is not our province to substitute our judgment under such circumstances unless the verdict is so unreasonably improbable or unsatisfactory as to justify entertaining a reasonable doubt of the defendant's guilt. *People v. Lobb*, 17 Ill.2d 287, 161 N.E.2d 325. As was stated in *People v. Russell*, p. 331 (Ill.), p. 311, (N.E.),

" . . . the requirement that the defendant's guilt be proved beyond a reasonable doubt does not mean that the jury must disregard the inferences that flow normally from the evidence before it. Here all of the inferences from the evidence pointed toward the defendant's guilt. The jury was not required to search out a series of potential explanations compatible with innocence, and elevate them to the status of a reasonable doubt."

It is also the settled law in this State that the fact of flight is a circumstance which may be considered by the jury in connection with all of the other evidence in the case as tending to prove guilt. *People v. Dukes*, 12 Ill.2d 334, 146 N.E. 2d 14; *People v. Gibson*, 385 Ill. 371, 52 N.E.2d 1008. It is urged that shortly

after Sloan moved into the apartment Mrs. Haddock mistook him for another tenant and this casts doubt on the identification. It is true that they had some difficulties over his non-payment of rent and he had been asked to move. Whether from this it might be inferred that Mrs. Haddock was framing him and thus raises a reasonable doubt is for the jury and the trial court who heard and saw the witnesses and weighed the testimony. Where circumstantial evidence is the basis for a conviction, it is always possible to conjure up hypotheses and suppositions inconsistent with a defendant's guilt. This does not mean that where all of the evidence is considered it may be ballooned into a reasonable doubt.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Trapp, J. and Craven, J. concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

SEARS BANK AND TRUST COMPANY,)	
as Trustee under Trust No. 120625,)	
)	
Plaintiff-Appellant,)	
)	
v.	)	Appeal from the
	)	Circuit Court of
VILLAGE OF ITASCA, a Municipal	)	DuPage County
Corporation,)	
)	
Defendant-Appellee.)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is a declaratory judgment action brought by the owner of certain real estate in the Village of Itasca, seeking a judgment declaring that the Zoning Ordinance of the Village of Itasca classifying plaintiff's property in the R-2, single family residence, district is unconstitutional and invalid in its application to said property and that plaintiff has the right to develop said property into an automobile service station. Plaintiff appeals from a final judgment finding for defendant and dismissing plaintiff's complaint.

The property in question is located at the Northwest corner of Prospect Road and Irving Park Road in the Village of Itasca, Illinois. The parcel, irregular in shape, has

a frontage of 150 feet on Prospect Road and 160 feet on Irving Park Road. The subject property is approximately 1/4th of a larger parcel known as Lot 9 in H. O. Stone & Co. 's Addition to Itasca, on which Mr. and Mrs. Hotwagner, sole beneficiaries of the land trust in which title is held, reside. The Hotwagners, through plaintiff Trustee, have owned the property for approximately seven years and have resided in their home located on the property throughout that time.

Irving Park Road is a major four-lane State highway in Cook County, but it has only two lanes after it runs West of Route 45 into DuPage County, with the exception of a four-lane section running through the Village of Bensenville. It is two lanes through its entire length through the Village of Wooddale and through the Village of Itasca. Prospect Road to the South of Irving Park Road is paved with two southbound lanes and two lanes northbound, separated by a grass parkway. North of Irving Park, Prospect is a two-lane gravel country road. With respect to the four quadrants of the intersection of Irving Park Road and Prospect Road, all land West of Prospect Road is within the limits of the Village of Itasca and is zoned for single family residences; all land North of Irving Park Road on the East side of Prospect is an unimproved tract within the village limits of Itasca and is zoned M. limited manufacturing. It has in recent years been used for farming purposes. East of Prospect Road and South of Irving Park Road the land lies within the limits of the Village of Wooddale and is zoned

C-1, local commercial. This land has been improved with a shopping center and on the Southeast corner of the Irving Park-Prospect Road intersection is located an automobile service station.

The evidence shows that there are single family residences located across from the subject property on the South side of Irving Park Road West of Prospect Road.

The evidence further discloses that plaintiffs purchased Lot 9 for \$42,500.00 and its estimated value is now \$45,000.00 under existing zoning. The subject parcel, approximately 1/4th of Lot 9, is under contract to be sold for \$45,000.00, subject to rezoning to permit an automobile service station. There was no evidence offered as to the estimated value of the remainder of Lot 9 should the requested rezoning be granted.

Defendant's evidence indicated that the remaining portion of plaintiff's property would be depreciated in an unstated amount. Adjacent vacant land would be depreciated between 75% and 25% depending on the distance from an automobile service station site, and a developed residential property within the vicinity of a gas station or adjacent to it would be depreciated between 15% and 20%.

The volume of traffic on Irving Park Road West of Prospect was, according to the latest official traffic count taken in 1965, 10,300 cars per day. There was testimony that the volume of traffic on Prospect Road North of Irving Park Road was approximately 225 cars per day.

The Hotwagners have made no effort to sell either their entire lot or any part of it to be used for purposes for which it is presently zoned.

It would serve no useful purpose to reiterate here the oft-repeated factors to be considered in determining whether a given zoning ordinance is invalid as applied to a particular property. *LaSalle Nat. Bank v. County of Cook*, 12 Ill. 2d 40, 46, 47; *Hoffman v. City of Waukegan*, 51 Ill. App. 2d 241, 244. Such factors will be referred to herein insofar as they are relevant to the determination of this case.

Defendant has cited a multitude of cases, all of which clearly emphasize the basic tenet of zoning law, that each case must be decided on its own facts. It would serve no useful purpose to analyze each of the cases cited and to point out wherein they are distinguishable upon their facts.

We agree with the plaintiff that the surrounding uses, even though they are in another village, should and must be considered to determine whether the classification as applied to plaintiff's property is reasonable. *LaSalle Nat. Bank v. Village of Palatine*, 92 Ill. App. 2d 327, 334. It is equally evident that there must be a dividing line between different zoning classifications and that a street is usually a proper dividing line. *Bennett v. City of Chicago*, 24 Ill. 2d 270, 273; *American Oil Co. v. DuPage County*, 58 Ill. App. 2d 48, 52; *Berger v. Village of Riverside*, 69 Ill. App. 2d 148, 153. The Village authorities apparently decided that one of the dividing lines between single family residence and other permitted uses should be Prospect Road. Plaintiff has presented no evidence that the property is rendered useless as a result of the zoning classification applied to it by defendant Village. Loss in value to plaintiff's land is not, in itself, sufficient to justify setting aside an ordinance as

unreasonable. *Fiore v. City of Highland Park*, 76 Ill. App. 2d 62, 73.

In nearly every zoning case the property if rezoned in accordance with plaintiff's wishes would be more valuable than it is under the applicable zoning. *LaSalle Nat. Bank v. Village of Lombard*, 64 Ill. App. 2d 211, 216. The evidence indicates that the subject property is located in an area (in Itasca) where there has been no substantial changing trend in the uses to which the surrounding properties have been devoted. *Cosmopolitan Nat. Bk. v. Chicago*, 27 Ill. 2d 578, 584, 585. In fact, the evidence before us indicates that there has been substantial development in recent years of the land lying west of Prospect Road for single family residential use. Zoning is a legislative function and trial courts are not superior zoning boards of appeal. *American Oil Co. v. County of DuPage*, 58 Ill. App. 2d 48, 54.

Under the evidence taken most favorably to plaintiff the most that be said for plaintiff's case is that it presents a fairly debatable question as to the reasonableness of the restriction imposed, and under the circumstances, we believe the question should be determined by the village authorities and not by this Court. *Wehrmeister v. County of DuPage*, 10 Ill. 2d 604, 610.

JUDGMENT AFFIRMED.

MORAN, J. and DAVIS, J. concur.

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1001.A.² 481

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

LESTER R. KOCZUR,
Defendant-Appellant.

) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY -
) THIRD MUNICIPAL DISTRICT

) Honorable
) Paul A. O'Malley,
) Magistrate Presiding.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty on a charge of battery and fined \$100.00. From that conviction the defendant has appealed and has raised the following points in his brief: (1) the defendant contends that the court erred in denying the defendant a continuance after permitting the State to amend the complaint, wherein the date of occurrence was changed from October 22, 1966, to October 15, 1966, and (2) the court admitted incompetent evidence relative to statements made by defendant upon the arrival of the police which was contrary to the written reports of the police.

The facts are: The defendant, his wife, together with a friend and his wife, were having dinner in the Pavillon Restaurant to commemorate the wedding anniversary of Mr. and Mrs. Koczur. An altercation arose between the head waiter at the restaurant and other guests.

Mrs. Ruth Horwitz testified that on October 22, 1966, at about 9:30 P. M. she was at the Pavillon Restaurant with her husband. At about 11:30 P. M. they prepared to leave. Mrs. Horwitz waited in the foyer while her husband went out to get the car. While waiting for her husband she was hit in the jaw and knocked down.

After Mrs. Horwitz had testified she was recalled as a witness and stated that the incident took place on October 15, 1966, and the State asked leave to amend the date on the



complaint from October 22, 1966, to October 15, 1966, which amendment was allowed over objection.

Mrs. Susan Greenberg testified that she was present at the Pavillon Restaurant on October 15, 1966, and saw the defendant strike Mrs. Horwitz on the left side of her face. She also testified that she heard the defendant say "Let's get rid of the 'goddam' (sic) Jews and Kikes."

Donald Horwitz testified that he was with his wife at the Pavillon Restaurant on October 15, 1966. About 11:30 P. M. he left the restaurant to get his car and when he came back he saw a commotion. He also saw his wife in a semi-conscious position on a chair with a glass of water. The defendant was standing there and said "I got even with one of those 'goddam' (sic) Jews and Kikes." Mr. Horwitz testified that the defendant told a Sheriff's police officer that he had struck Mrs. Horwitz.

The defendant testified he was at the Pavillon Restaurant on October 22, 1966, with his wife and Mr. and Mrs. Reese. He saw Mr. Reese being held by many people and came to his aid. The defendant contended that he was hit and kicked by five or six individuals, including Mr. Horwitz and a parking lot attendant. He also claimed that Mr. Horwitz kicked him in the face. Thereafter both Mr. Reese and the defendant were thrown out of the restaurant. Mrs. Reese and Mrs. Koczur were also thrown out of the restaurant.

Mr. Reese testified that the maitre d' struck him on the head with a wine bottle after he gave the maitre d' some money. He also testified that he saw Mr. Koczur, the defendant, being struck many blows and that the defendant was bleeding badly. The witness was grabbed by six men who carried him through the cocktail lounge and ejected him. The defendant was thrown out approximately ten minutes after Mr. Reese had been thrown out. Mr. Reese testified that he was fighting for



approximately fifteen minutes at which time Mr. Horwitz arrived on the scene and the witness was knocked down and kicked in the stomach and chest.

Mrs. Koczur, the wife of the defendant, testified that she was present at the restaurant on October 22, 1966, and that her husband was not rumpled or disturbed in his attire; that out of the clear, blue sky Mr. Horwitz came and punched her husband, and four or five men stood there shouting at him.

Mrs. Reese stated that she was at the restaurant on that same date and that she was thrown out by the parking lot attendant. She further testified "We were on our way out when a group of men jumped Mr. Koczur and Mr. Reese," and that Mr. Koczur was knocked down once and got up. She further testified that Mrs. Koczur and she were thrown out as were their two husbands.

Mr. Frank Hollander testified as a rebuttal witness for the State. He testified that Mr. Reese hit him in the face with his fist approximately three or four times and that he did not hit Mr. Reese.

The defendant's first contention is that the court erred in failing to grant the defendant a continuance after permitting the State to amend the date in the complaint from October 22, 1966, to October 15, 1966. During the course of the State's case and while the State's second witness was on the stand, the State asked leave to change the date in the complaint from October 22 to October 15, 1966. The defendant thereupon asked for a mistrial and for a continuance on the ground that he had prepared his defense having in mind the date set forth in the complaint, namely, October 22, 1966, and that he was taken by surprise. The court overruled the objection, permitted the amendment, and denied the motion for mistrial and for a continuance.



The defendant relies on Section 114-4 (b)(6) (Ill. Rev. Stat. 1967, chap. 38, sec. 114-4 (b)(6)). This section reads in pertinent part as follows:

"(b) A motion for continuance made by defendant more than 30 days after arraignment may be granted when:

* * *

(6) The amendment of a charge or bill of particulars has taken the defendant by surprise and he cannot fairly defend against such an amendment without a continuance." (Emphasis supplied)

It will be noted that the motion for continuance under this section is not mandatory but by its wording is left to the discretion of the trial court. In People v. Latimer, 35 Ill. 2d 178, 181, the court stated:

"The granting of a continuance to permit preparation for a case is a matter resting within the sound judicial discretion of the trial court, and we will not disturb the court's ruling on review unless it is shown that the discretion has been abused. (People v. Wilson, 29 Ill.2d 82; People v. Clark, 9 Ill.2d 46.) A conviction will not be reversed unless it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights."

By virtue of Section 111-5 of chapter 38 (Ill. Rev. Stat. 1965, chap. 38, sec. 111-5) the court is authorized to amend a complaint on motion of the State's Attorney at any time because of formal defects. The amendment of a complaint to change the date of the occurrence constitutes a formal defect. People v. Heidleberg, 66 Ill. App. 2d 169.

In People v. Wilson, 84 Ill. App. 2d 215, 219, the court said:

"The statute provides that the indictment shall state 'the time and place of the offense as definitely as can be done.' * * * This section was construed in People v. Petropoulos, 59 IllApp2d, 298, 208 NE2d 323, where the court held that an indictment was not fatally defective where there is a variance as to the time of the alleged offense as long as the proof shows that the crime took place before the date of the indictment and is not barred by the Statute of Limitations. In so holding, the court followed well settled Illinois law under the prior statute."

There was no showing that the defendant was prejudiced by the trial judge's denial of his motion for continu-

ance. Four witnesses for the defense testified that the occurrence took place on October 22nd. All of the witnesses for the State testified that the occurrence took place on October 15th. In fact, the defendant's testimony, as well as that of his witnesses, indicated they were not in the Pavillon Restaurant on October 15th, but there is little doubt from a reading of the testimony that both the State's witnesses and the defendant and his witnesses were testifying to a single occurrence. By the trial court's denial of a motion for continuance after the amendment to the complaint the defendant was in no way prejudiced.

The defendant next contends that incompetent evidence was admitted relative to statements made by defendant when the police arrived which was contrary to the written reports of the police. In support of this contention the defendant argues that the court permitted witness Horwitz to testify that the defendant stated to the police, "There is a lady sitting in the chair that I struck." That after the court permitted this evidence against the defendant it then denied the defendant the right to cross-examine relative to such conversation. The defendant made no objection to this testimony. The defendant particularly points to the following objections which were sustained, and contends that the court employed two standards of admissibility of evidence; one for the prosecution wherein it permitted conversation or statements allegedly made by the defendant but denied the defendant the right to cross-examine. The following is the portion of the record indicating testimony on cross-examination of the witness Horwitz about which defendant complained:

- "Q. What other conversation?
- "Mr. Shapiro: (Prosecutor) Objection, this other conversation would be hearsay - it would be self-serving.
- "The Court: Objection sustained.
- "Mr. Dunagan: So, the only thing he said to the Sheriff's Police was 'There is a lady sitting in the chair that I struck.'
- "Mr. Shapiro: Objection.
- "The Court: Objection sustained.

Mr. Dunagan: Q. Will you tell us any reaction you observed from the Sheriff's Police.
 Mr. Shapiro: Objection.
 The Court: Objection sustained.
 Mr. Dunagan: Did an incident occur the following Saturday night where you were involved in a fight?
 Mr. Shapiro: Objection.
 The Court: Objection sustained.
 Mr. Dunagan: Q. Did you on October 22, 1966, in the Pavillon Restaurant have an involvement and quarrel on that date?
 Mr. Shapiro: Objection.
 The Court: Objection sustained."

On cross-examination of the witness Mr. Horwitz prior to the question "What other conversation?" not mentioned in defendant's brief were the following questions and answers:

"Q. He told the sheriff's police that he struck your wife?
 A. Yes.
 Q. Was there any other conversation other than he just walked up to the sheriff's police and said, 'There's the lady I struck.'
 A. There was other conversation.
 Q. What other conversation?"

We believe that the court properly sustained the objection to any other conversation on the basis of the objection that it would constitute hearsay. In People v. Carpenter, 28 Ill. 2d 116, 121, the court said:

"An examination of the basis for this rule will clarify the situation. 'Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court assertor. (McCormick, Law of Evidence, sec. 225; see also, Cleary, Handbook of Illinois Evidence, sec. 31.1 et seq.) The fundamental purpose of hearsay rule was and is to test the real value of testimony by exposing the source of the assertion to cross-examination by the party against whom it is offered."

Evidence as to what the police officer said would be hearsay if its purpose was to prove the truth of the matter stated, since the officer was not under oath at that time and not subject to cross-examination. Furthermore, the relevancy of the testimony sought to be adduced at that time was not shown as no offer of proof was made as to what the defendant hoped .

to elicit from the witness.

On cross-examination of the witness Donald Horwitz defense counsel posed the following questions and the following answers were given:

"Q. Did he walk over to you then after he made this insulting remark and say, 'I struck Mrs. Horwitz?'

A. His conversation was that he struck a woman but he didn't know her name at that time.

Q. Then he didn't tell you he struck Mrs. Horwitz?

A. He didn't use my wife's name because he didn't know my wife's name.

Q. Did he point her out?

A. Yes, he did point her out.

Q. Did he point her out when he stood ten yards away from the chair where the lady was?

A. After the police officers came, he pointed out my wife as the woman he struck.

Q. He told the sheriff's police that he struck your wife?

A. Yes."

The point here raised by the defendant is that the court admitted incompetent evidence relative to statements made by the defendant when the police arrived which was contrary to the written reports of the police. Nothing in the argument of the defendant under this point refers to any written reports of the police and this court is at a loss to determine what written reports are referred to in this point. Points not argued are waived. Supreme Court Rule 341 (e)(7) (Ill. Rev. Stat. 1967, chap. 110A, sec. 341 (e)(7)). Since there is no reference made to written reports of police and no argument thereon, this court will consider that portion waived. With reference to the contention that the defendant's statement to the police, "There is a lady sitting in the chair that I struck", was incompetent, we can only say that that statement constituted an admission. In People v. Niemoth, 409 Ill. 111, 118, cert. denied 344 U. S. 858, the court said:

"Where a crime has been committed the admissions of a party charged with a crime, deliberately made, are always admissible for the purpose of showing the guilt of the accused."

In I.L.P. Criminal Law, Section 431, we find the following:

"Admissions voluntarily and deliberately made may always be shown."

The trial court in this case heard much contradictory evidence and it was the office of the trial judge to determine the credibility of the witnesses. We cannot say from an examination of this case that the trial court committed reversible error.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and SCHWARTZ, J. concur.

